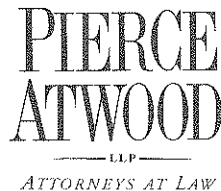


Licensee's Response to the
Petition to Revoke, Modify or Suspend

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March 15, 2011

Via U.S. Mail and Email

Susan M. Lessard, Chair
Board of Environmental Protection
c/o Terry Dawson
#17 State House Station
Augusta, Maine 04333-0017

RE: Appeal of Department Permit A-001041-71-A-N (SM)
Berwick Iron & Metal Recycling, Inc.

Dear Chair Lessard:

Enclosed for filing is the Response of Berwick Iron & Metal Recycling, Inc. to the Petition to Revoke, Modify, or Suspend of Jeanette and Doug Seivwright, Robert and Donna Duffy, Tom and Carol Planche, and Joyce and Raymond Provencher.

Sincerely,

A handwritten signature in black ink, appearing to read "Matthew D. Manahan", followed by a long horizontal line extending to the right.

Matthew D. Manahan

Enclosure

cc: Service List (via U.S. Mail)

STATE OF MAINE
DEPARTMENT OF ENVIRONMENTAL PROTECTION
IN THE MATTER OF

BERWICK IRON & METAL RECYCLING, INC.)	
Berwick)	AIR EMISSIONS LICENSE
York County)	
#A-1041-71-A-N)	

**RESPONSE OF BERWICK IRON & METAL RECYCLING, INC.
TO THE PETITION TO REVOKE, MODIFY, OR SUSPEND OF
JEANETTE AND DOUG SEIVWRIGHT, ROBERT AND DONNA DUFFY,
TOM AND CAROL PLANCHE, AND JOYCE AND RAYMOND PROVENCHER**

This petition to revoke, modify, or suspend (the “Petition”) is an improper use of the Department’s permit revocation, modification, and suspension procedures to try to circumvent the process for appealing a Department permit. For the reasons below, the Board should dismiss this Petition.

I. Background

BI&MR is a relatively small, family-owned metal recycling facility. On September 24, 2009 BI&MR purchased a used “hammer-mill” metal shredder (the “Shredder”), manufactured by Texas Shredder, Inc., for use at BI&MR’s metal recycling facility on Route 236 in Berwick. The Shredder was delivered from North Carolina to BI&MR’s property in March 2010. BI&MR has not yet operated the Shredder. The Shredder will be powered by a diesel engine rated at 3,600 horsepower, to process scrap metal and facilitate the recycling of cars and other large scrap items. The Shredder will process large metal objects such as crushed cars to reduce the metal to a six-inch size. The shredded metal will be divided into ferrous and non-ferrous components using a large eddy-current electromagnet. All components, including aluminum, copper, plastic, and foam, will be sold for further processing off-site.

On January 25, 2010, prior to delivery of the Shredder and the diesel engine, representatives of BI&MR met with Department staff at the Portland regional office to discuss DEP permitting requirements for operation of the Shredder. Department staff at that meeting informed BI&MR that it was their opinion that DEP permits would not be required to install the Shredder and the diesel engine, but that BI&MR would need DEP waste processing and air permits before operating the Shredder. Since that time DEP has been continuously informed of the progress at the site, visiting occasionally.

On June 21, 2010, BI&MR applied to the DEP for a minor source air emission license for the Shredder and the diesel engine. The potential regulated pollutant emissions from the Shredder consist of particulate matter generated from the physical impact of the shredder hammers on the materials, as well as from the potential heating of the material by the friction of the Shredder. The diesel engine will burn ultra low sulfur diesel fuel with a maximum sulfur content of 15 ppm or less by weight (equivalent to 0.0015% by weight or less).

In its air license application, BI&MR stated that "BI&MR proposes to install and operate a diesel engine to directly drive the shredder, and does not propose to operate any electric generating units at this time." Air License Application, p. 5.

On September 9, 2010 Civil Consultants submitted an application to the Town of Berwick Planning Board for conditional use and site plan approval for the Shredder. The Planning Board conducted numerous meetings, hearings, and site visits over a period of more than six months to consider the application. Petitioners participated fully, through counsel, in the proceedings before the Berwick Planning Board.

On September 17, 2010, BI&MR submitted to the Department a solid waste processing facility application for the Shredder.

On October 27, 2010 the Department issued the air emission license (the “License”). On November 26, 2010 the Petitioners filed an appeal to the Board of the License.

On March 3, 2011 Civil Consultants submitted to the Town of Berwick Planning Board, on behalf BI&MR, a draft of the Spill Prevention, Control, and Countermeasure (“SPCC”) Plan for the facility, to demonstrate to the Planning Board that the facility would comply with the requirements in the Town of Berwick Land Use Ordinance relating to control of pollution. The draft SPCC was clearly marked “DRAFT” in light gray font in the middle of every page.

On March 3, 2011 the Planning Board voted unanimously to grant BI&MR a Conditional Use and Site Plan permit.

II. The Petition

The Petitioners allege that the License should be revoked, modified, or suspended for three reasons:

- A. BI&MR constructed the Shredder without air or waste facility permits from the Department. See Petition, pp. 2-4.
- B. BI&MR submitted the air and waste facility applications without a public information meeting. See Petition, pp. 4-5.
- C. BI&MR did not include a standby diesel generator in its air license application. See Petition, pp. 5-7.

In several instances, as will be discussed below, Petitioners are wrong in their assumption of the relevant facts.¹ And, in any case, none of these reasons is a sufficient basis to revoke, modify, or suspend the License.

¹ Petitioners “reserve the right to supply additional evidence to support the factual basis of its Petition.” Petition, p. 2 n.1. In fact, Petitioners have no such right, unless the Board decides to conduct a hearing in this matter. See DEP Reg. 2.27 (“The petition, once filed, may not be supplemented, except in a public hearing”).

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III. Discussion

A. **BI&MR's construction without a DEP license was known prior to issuance of the License, and is not a basis to revoke, modify, or suspend the License.**

Petitioners spend several pages discussing the fact that BI&MR constructed the Shredder without a license. Petitioners assert that this construction violated DEP statutes and rules, and thus that BI&MR "has violated laws administered by the Department," justifying revocation, modification, or suspension. Petitioners are wrong for several reasons.

First, although it is true that BI&MR installed the Shredder and diesel engine without a DEP license, it did so only after consultation with DEP staff. DEP staff indicated that DEP permits would not be required for installation of the Shredder and the diesel engine, but that BI&MR would need DEP waste processing and air permits before operating the Shredder. Thus, although this advice was in error with respect to air licensing requirements, BI&MR did not knowingly violate DEP air licensing requirements and, in fact, made a concerted effort to comply with those requirements.

Second, although it is true that the Department's air rules require an air emissions license prior to beginning construction of a new source, it is not true, contrary to Petitioners' assertion on pages 3-4 of their Petition, that the Waste Management Act ("WMA") requires a waste facility permit prior to the addition of a new piece of equipment at an existing waste facility, as long as that new equipment is not operated without a waste facility permit.

The WMA provides that "no person may locate, establish, construct, expand the disposal capacity of or operate any solid waste facility unless approved by the department under the provisions of this chapter." 38 M.R.S. § 1310-N. This does not require approval prior to adding equipment at an existing waste facility, as long as the additional equipment is not operated. BI&MR's solid waste facility was already located, established, and constructed, so adding a

piece of equipment to it did not trigger the prohibition in Section 1310-N. The new Shredder did not expand disposal capacity because BI&MR is a recycling facility, not a disposal facility. Finally, as long as the new piece of equipment is not operated, it does not violate the prohibition on operation without a license. The Shredder has not yet been operated.

A comparison of the provisions in the air rules (“Any person who . . . will emit . . . regulated pollutants from any existing or new source may not begin actual construction . . . without an air emission license,” DEP Reg. 115.1(B)) to the provisions in the WMA (“no person may locate, establish, construct, expand the disposal capacity of or operate any solid waste facility unless approved by the department under the provisions of this chapter,” 38 M.R.S. § 1310-N) is informative. There is no mention in Section 1310-N of the need for a permit to be issued prior to beginning actual construction at an existing source.

Third, the Department was well aware that the Shredder and its associated equipment had been constructed prior to issuance of the License. BI&MR has never tried to hide that fact. For Petitioners to assert that construction of the Shredder without a license from DEP justifies license revocation, suspension, or modification would mean that companies that mistakenly construct a facility without a permit could never obtain an after-the-fact permit to come into compliance unless they first completely remove the facility and return the property to its preexisting condition. That would make no sense, and would be inconsistent with the Department’s historical practice. Instead, construction without a permit is an enforcement issue for consideration by the Commissioner and his staff.

The situation in which violation of a law administered by the Department may justify revocation, modification, or suspension is not when a violation occurred before the DEP license was issued, with full knowledge of the violation, but when there has been some egregious

violation subsequent to issuance of the license that shows that the licensee is not willing or able to comply with the terms of the license. That is not the case here.

In short, construction of the Shredder without a DEP license is not a valid basis to revoke the License.

B. The lack of a public information meeting is not a basis to revoke, modify, or suspend the License.

Petitioners next assert that BI&MR should have conducted a public information meeting (“PIM”) pursuant to Chapter 2.13, and that failure to do so justifies revocation, modification, or suspension. Petitioners are wrong.

Chapter 2.13 requires a PIM for any application that requires a pre-application meeting pursuant to Chapter 2.10(B). Petitioners allege that a pre-application meeting was required in this case under Chapter 2.10(B)(7), for “projects requiring new or amended licenses involving more than two bureaus.” Petitioners assert that “BI&MR's project requires a license from at least two bureaus, the Bureau of Air Quality Control and the Bureau of Remediation and Waste Management.” Although that is true, BI&MR’s project does not require a license from *more than* two bureaus, which is the triggering requirement for a pre-application meeting and thus a PIM. “More than two” does not mean two.

C. Installation of an unpermitted standby diesel generator is not a basis to revoke, modify, or suspend the License.

Finally, Petitioners assert that BI&MR’s installation of a standby diesel generator required a permit from the Department and thus justifies revocation, modification, or suspension because (1) by installing the generator BI&MR allegedly violated a law administered by the Department, (2) BI&MR obtained the License by misrepresenting or failing to disclose all

relevant facts – the existence of the generator, and (3) there has been a change in circumstance.

Again, Petitioners are wrong.

First, and most importantly, Petitioners are wrong about the relevant facts. Petitioners assert that “BI&MR's SPCC plan states that its facility will utilize a free-standing separate diesel generator with an associated 900 gallon diesel fuel tank. *See* SPCC Plan at 1-3.” Petition at p. 6. In fact, the draft² SPCC plan does not say that the facility “will utilize” the generator. Rather, the SPCC plan simply states that an above ground diesel tank associated with the standby generator is “on the site.” That is not the same as saying the generator will be connected or operated.

The diesel generator shown on the draft SPCC plan is a portable unit brought on site in November 2010 as a potential generator. BI&MR does not own the generator and has not decided whether to use it. The portable generator has not been connected or otherwise installed. At this point, BI&MR has no plans to connect the generator or use it. That decision will depend on whether the cost of buying power off the grid becomes uneconomical in the future. If at some point in the future BI&MR decides to use the generator, it will first apply for an amendment to the License.

BI&MR did not include the generator with its air license application because it did not own the generator and had no intention of purchasing such a generator at the time BI&MR submitted the air license application. Nor did BI&MR submit an amended air license application after it brought the portable generator on site, because BI&MR did not purchase the generator and does not have current plans to use the generator. BI&MR included the portable generator in

² Interestingly, the copy of the draft SPCC plan attached to Petitioners' petition does not show the word “DRAFT” that was included as a “watermark” in the middle of every page of the draft SPCC plan submitted to the Berwick Planning Board. Attached as Exhibit A is a copy of the cover page of the draft SPCC plan that shows the word “draft” that is stamped on every page of the plan.

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the draft SPCC plan because it was on site with a fuel tank, but that does not mean that it is operational.

Having the generator on site did not violate a law administered by the Department. The applicable requirements are contained in DEP Reg. 115.1(B) and DEP Reg. 115.4(B)(5). Chapter 115.1(B) requires that “once a source requires an air emission license, all emissions units which emit regulated pollutants at the source must be included on the license,” and “any person who emits, will emit, or causes to be emitted regulated pollutants from any existing or new source may not begin actual construction, operate, maintain, or modify the new or existing source without an air emission license from the Department” DEP Reg. 115.4(B)(5), by reference to DEP Reg. 115.3(E), requires that a license must include a “list of all emission units that are subject to licensing.” These provisions do not require inclusion of a unit that does not emit regulated pollutants because it is merely located at a facility but not connected or operated.

Furthermore, BI&MR did not begin actual construction of the generator simply by bringing this portable unit on site. “Begin actual construction” is defined to mean, in relevant part, “initiation of physical on-site construction activities on an emissions unit which are of a permanent nature.” DEP Reg. 100.16. The generator is a portable unit; BI&MR did not install the unit or otherwise undertake any physical on-site construction activities of a permanent nature to support operation of the generator.

BI&MR did not obtain the License by misrepresenting or failing to disclose all relevant facts – the existence of the generator – because the generator was not on site at the time BI&MR submitted the air application, and BI&MR did not and does not have any plans to connect or operate the generator. In its air license application, BI&MR stated that “BI&MR proposes to install and operate a diesel engine to directly drive the shredder, and does not propose to operate

any electric generating units at this time.” Air License Application, p. 5. With this language BI&MR clearly left open the possibility of adding an electric generating unit at some point in the future.

Finally, there has not been a change in circumstance that requires revocation, suspension or a temporary or permanent modification of the terms of the license, because BI&MR still has no plans to make permanent physical installations at the facility to support the generator or to connect the generator so that it will emit regulated pollutants. In any case, even if BI&MR did have such plans they would not trigger the need for revocation, suspension, or modification. Rather, the solution would simply be to seek an amendment to the License. It is extreme and unnecessary for Petitioners to suggest that the Board should get involved in such a situation via the Board’s permit revocation, suspension, or modification authority.


IV. Conclusion

This Petition is an inappropriate use of the Board’s permit revocation, suspension, and modification authority. The Board’s permit revocation, suspension, and modification authority is used sparingly, for good reason. Not only have Petitioners misstated the relevant facts, but they have asked the Board to become involved in a matter that is more appropriate as an exercise of the Department’s enforcement discretion, because BI&MR has never misrepresented any facts or intentionally violated any law or rule. BI&MR, as the licensee of this minor source air license, is a small, family owned business that seeks to operate its business in compliance with all laws and rules. BI&MR has tried at all times to comply with the advice of DEP staff.

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For all of the foregoing reasons, BI&MR requests that the Board deny the Petition.

Dated: March 15, 2011

A handwritten signature in black ink, appearing to read 'Matthew D. Manahan', is written over a horizontal line.

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